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No. 76-52

# In the Supreme Court of the United States

OCTOBER TERM, 1976

JOSE DEMETRIO ARTEAGA-LIMONES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. 2805-2826) is reported at 529 F. 2d 1183.

**JURISDICTION**

The judgment of the court of appeals (Pet. App.) was entered on April 8, 1976. A petition for rehearing was denied on June 9, 1976 (Pet. App. 3913). Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to July 23, 1976, and the petition was filed on July 15. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner was properly convicted for both conspiracy to import marihuana and conspiracy to possess marihuana with intent to distribute.

2. Whether the government's introduction, in its case in chief, of a 1961 conviction of petitioner for a similar offense amounted to reversible error.

3. Whether the government's witnesses' inability to remember the exact dates upon which the offenses were committed denied petitioner due process.

## STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiracy to import marihuana (count 1), conspiracy to possess marihuana with intent to distribute (count 3), and the completed substantive offenses (counts 2 and 4), in violation of 21 U.S.C. 963, 952(a), 960 (a)(1), 846 and 841(a)(1). He was sentenced to consecutive terms of imprisonment for five years on each count, to be followed by consecutive special parole terms of five years. The court of appeals affirmed (Pet. App. 2805-2826; 529 F. 2d 1183).

The government's evidence showed that on or about January 30, 1973, Jose Castillo-de la Garza, a resident of Mexico, met with petitioner at the latter's home in Del Rio, Texas. Both men traveled to Acuna, Mexico, where they obtained sacks of marihuana which they brought back across the border to Del Rio. The sacks were stored in petitioner's home for ten to fifteen days and then taken by truck to San Antonio, Texas, where they were sold to



an unidentified purchaser. For this sale Castillo received approximately $60,000, which he gave to petitioner (A82-A89).[1]

In late January or early February 1973, Castillo met Alvaro Moreno, a narcotics dealer, who agreed to include Castillo in a future narcotics transaction (A20-A21, A25-A26).

On approximately May 5, 1973, Castillo drove petitioner from Del Rio to a small ranch by the border, where they observed two of petitioner's employees bringing 300-400 pound sacks of marihuana from Mexico. The sacks were initially taken to petitioner's house, but upon his direction that they be concealed elsewhere, the employees took them away. Two hours later the employees returned and reported that the marihuana had been hidden at the house of co-defendant Mike Lozano Cantu (A28-A42).[2]

Approximately two weeks later Castillo told Moreno about the marihuana (A27, A48). Moreno asked whether Castillo would sell the marihuana on credit and said that he wished to take delivery the following day at a motel in San Marcos, Texas. Castillo replied that he would discuss the matter with petitioner, and later that evening he told Moreno that petitioner had agreed (A50). The

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[1]Citations are to the appendix filed by petitioner in the court of appeals. We are lodging a copy of the appendix with the Clerk of this Court.

[2]Cantu was charged with possession of marihuana with intent to distribute and with conspiracy to commit that offense. He was sentenced to concurrent five-year terms of imprisonment with a five-year special parole term. He has not filed a petition for a writ of certiorari.

following morning Castillo drove to the motel in San Marcos. There he met Cantu, who brought a portion of the marihuana (A52). Petitioner arrived subsequently and announced that the remainder was in a parked car at a nearby supermarket parking lot. Petitioner drove Castillo to this location, where they met Moreno and gave him the marihuana (A52-A55).

When Moreno did not pay for the marihuana after two months, Castillo flew to New York City to see him. Moreno gave Castillo $800 and a promise of more money when the marihuana—which was still unsold and which he showed to Castillo—was marketed (A60-A62). A month later petitioner and Castillo received $11,500 from Moreno (A69-A70).

On May 16, 1974, petitioner and his attorney appeared at the office of Roger Cerny, a local justice of the peace, on unrelated matters. Petitioner admitted to Cerny that he had smuggled marihuana into the United States and remarked that "he knew every crossing point on the Texas-Mexican Border" (Pet. App. 2823).

## ARGUMENT

1. Petitioner claims (Pet. 4, 7) that the Double Jeopardy Clause prohibits his conviction and multiple punishment for conspiracy to import marihuana and conspiracy to possess marihuana with intent to distribute. These conspiracies, however, amount to separate crimes, violating different federal statutes and proved by different facts, and the Double Jeopardy Clause is not offended by multiple punishments for multiple crimes. See *American Tobacco Co.* v. *United States*, 328 U.S. 781.

From the facts adduced by the government in this case, the jury might reasonably have concluded that the conspiracy to import marihuana terminated with its transportation across the border and concealment at



Cantu's house.[3] The marihuana remained there for a substantial time with no indication that petitioner or anyone else engaged in the importation venture had a continuing involvement in seeking means to distribute it. It was only by happenstance that Castillo met Moreno, who had not participated in the importation of the marihuana and who evidently was unaware of its existence when he renewed the offer he had made months before to include Castillo in one of his drug distribution ventures. On these particular facts, the jury could properly conclude that ensuing events were sufficiently unrelated to the earlier importation scheme to constitute an independent conspiracy. See *United States* v. *Varelli*, 407 F. 2d 735, 746 (C.A. 7), affirmed on remand *sub nom. United States* v. *Saletko*, 452 F. 2d 193, certiorari denied, 405 U.S. 1040.[4]

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[3]The district court charged the jury (Tr. 410) that each count of the indictment "alleges a separate and distinct offense as to each defendant and therefore you must determine each count separately, distinctly and apart from the others."

[4]*United States* v. *Honneus*, 508 F. 2d 566 (C.A. 1), certiorari denied, 421 U.S. 948, and *United States* v. *Adcock*, 487 F. 2d 637 (C.A. 6), said by petitioner (Pet. 4-5) to conflict with the decision below, are distinguishable. Both involved an indivisible, continuous conspiracy stemming from a single agreement. In both cases the court recognized that Congress has the power to condemn different aspects of related conduct as separate crimes if, as here, there are meaningful distinctions between the elements constituting each offense. *Honneus*, *supra*, 508 F. 2d at 569; *Adcock*, *supra*, 487 F. 2d at 639-640.

Contrary to petitioner's view (Pet. 5), there is no inconsistency between *Braverman* v. *United States*, 317 U.S. 49, and *American Tobacco Co.* v. *United States*, 328 U.S. 781. In *Braverman* the Court held that one agreement to commit several unlawful acts did not amount to several conspiracies under the general conspiracy statute (now 18 U.S.C. 371), stating that "[t]he single agreement is the prohibited conspiracy, and however diverse its objects it violates but

2. As part of its case in chief, and over petitioner's general objection to the admissibility of proof of any previous misconduct, the government introduced a 1961 conviction of petitioner for smuggling marihuana (A181-A183). The court of appeals found this to have been error, ruling that the 1961 conviction was too remote in time and that it was not so necessary to prove intent as to outweigh its possible prejudicial impact (Pet. App. 2820-2821). The court also ruled, however (with one judge dissenting), that petitioner's imprecise objection to the admissibility of this evidence at trial had been too generalized to preserve the point on appeal, and that, in any event, the error

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a single statute [Section 371]" (317 U.S. at 54). The defendants in *American Tobacco* unsuccessfully sought to raise *Braverman* as a bar to their convictions for conspiracy to restrain trade, in violation of Section 1 of the Sherman Act, and for conspiracy to monopolize, in violation of Section 2. They said that "there is but one conspiracy, namely, a conspiracy to fix prices" (328 U.S. at 788). The Court in effect explained, however, that a single agreement with several unlawful objects might amount to more than one conspiracy if different elements of the agreement violate different conspiracy statutes: "In contrast to the single conspiracy described in [*Braverman*] in separate counts, all charged under the general conspiracy statute [18 U.S.C. 371], we have here separate statutory offenses, one a conspiracy in restraint of trade that may stop short of monopoly, and the other a conspiracy to monopolize that may not be content with restraint short of monopoly. One is made criminal by § 1 and the other by § 2 of the Sherman Act" (*ibid.*).

The present case, charging petitioner with conspiracy to import marihuana in violation of Section 963, and with conspiracy to possess marihuana with intent to distribute, in violation of Section 846, is like *American Tobacco* rather than *Braverman*. Thus, even if in this case the petitioner had agreed in one agreement both to import marihuana and to distribute it, the different unlawful objects of that agreement might amount to, and be charged as, different criminal conspiracies violating both Section 963 and Section 846. *United States* v. *Marotta*, 518 F. 2d 681 (C.A. 9); *United States* v. *Houltin*, 525 F. 2d 943 (C.A. 5).



was harmless in light of the ample evidence of guilt and other proof of petitioner's familiarity with marihuana smuggling (*e.g.*, his remarks to Judge Cerny) (Pet. App. 2822-2823).

Petitioner claims that the error was not harmless, relying on the dissenting opinion below (Pet. 8). This contention presents no issue of general importance warranting further review. Furthermore, the matter was correctly decided by the majority below, upon whose opinion we rely (Pet. App. 2823-2824).

Nor is there any reason for the Court to consider, as petitioner suggests (Pet. 8-9), a blanket rule forbidding the prosecution from introducing in its case in chief evidence of prior convictions for similar offenses. When relevant to prove a matter essential to support a conviction, prior similar convictions are expressly made admissible by Rule 803(22), Fed. R. Evid. Questions concerning the timing of the admission of such evidence, as well as those going to probative value (such as remoteness), are best left to the discretion of the trial judge, who is in the most favorable position to examine and resolve them in the context of the trial itself.

3. The indictment charged that petitioner committed the offenses "on or about" certain enumerated dates. From the outset the principal government witness, Castillo, acknowledged that he was unable to specify the exact dates on which the drug transactions occurred (A25, A49). Nor did any other government witness pinpoint the specific dates. Petitioner contends that the failure to prove the exact dates of the offenses charged denied him due process since his alibi defense was premised upon a showing that on the particular dates stated in the indictment he was far away from the places where the offenses were committed.

The dates on which the charged offenses occurred, however, were not elements of the crimes that the government was required to prove. Indeed, it would appear that the only reasons for including any dates in an indictment are to give the defendant adequate notice of the offense charged and to allow him to determine whether he has a defense under the statute of limitations. See *Ledbetter* v. *United States*, 170 U.S. 606, 612-613; *United States* v. *Somers*, 496 F. 2d 723 (C.A. 3), certiorari denied, 419 U.S. 832; *United States* v. *Arradondo*, 483 F. 2d 980 (C.A. 8), certiorari denied, 415 U.S. 924; *United States* v. *Antonelli*, 439 F. 2d 1068 (C.A. 1); *Russell* v. *United States*, 429 F. 2d 237 (C.A. 5). Defense counsel took full advantage of Castillo's lack of recall by cross-examining him on the matter extensively (A91-A100, A116-A118, A121-A125, A133-A139, A144-A145). In closing argument counsel stressed that Castillo's inability to recall specific dates was consistent with counsel's contention that Castillo's account of the crimes was a fabrication, designed to gain him leniency at a forthcoming sentencing hearing. The jury, as the sole judge of credibility, could rightfully conclude that Castillo was a believable witness notwithstanding his inability to pinpoint the dates of the activities about which he testified. Its decision not to accept petitioner's alibi defense did not deny petitioner due process.



## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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